

United States  
Court of Appeals  
For the Ninth Circuit

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STEPHEN GRANAT, as Administrator of the  
Estate of Mary A. O'Keefe, Deceased,

Appellant,

vs.

WALTER SCHOEPSKI,

Appellee.

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REPLY BRIEF OF APPELLANT

---

Upon appeal from the District Court of the United States  
for the District of Montana.

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DOEPKER & HENNESSEY,  
Medical Arts Bldg.  
Butte, Montana;

GRANAT & COLE,  
Malta, Montana,  
Attorneys for Plaintiffs and Appellants.

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No. 16125

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ARGUMENT

Appellants' Reply Brief will be confined to brief references pointing out to the Court that, as was contended for in our original Brief, the rule remains that where the physical evidence is contrary to the testimony of witnesses, the physical evidence controls.

On page 8 of the argument, counsel speak about the effect of destroying the opinion of the Highway Patrolman by assuming certain things that were asked him to the effect that "if the Buick were on the wrong side of the road?"

Later, we will contend that the appellee is bound by the testimony of the appellee, Walter Schoepski, by the evidence which he gave to the effect that the Buick *was not on the wrong side of the road*. So the cross examination as to that part of the argument simply is beside the point—assumption of something contrary to the evidence—because the Buick was not on the north side of the road, and analysis of the testimony of the so called appellee's two eye-witnesses will disclose that neither one of those witnesses testified that they saw the Buick on the wrong side of the road, and that therefore, this argument is not supported by the facts of the case.

## CIRCUMSTANCES SHOWING COURT'S DECISION ERRONEOUS

The knoll to the east of the bridge, the crown of the road which necessarily caused the road to slope towards the north from the bridge to the brow of the hill approximately 500 feet to the east; a driver approaching this point for the first time and coming upon the situation of the bridge which appeared to be narrow in the highway; all were reasonable matters to take into consideration in arriving at the fact as to the place upon the bridge where the collision between these two automobiles occurred, (Appellee Brief P. 10) and, regardless of whether it was a Model T Ford or a 1955 Cadillac, the same physical fact applies that in order to avoid the north rail of the bridge, any driver in any car would have a tendency to correct and pull his car to the left, and the only obligation that would be involved in this situation would be the obligation to observe and keep his car under control so that he stayed on his own north side of the bridge going west.

This fact, together with all of the circumstances and physical evidence here which would belie the so called eye-witness observation (of 72/100 of a second), are matters which are unanswerable and which will demonstrate that the so called eye-witness Pat West and his testimony did not rise to the level of competent evidence supporting the court's erroneous decision.

With relation to the cases quoted from on page 18 of Appellee's Brief, we call the court's attention to the fact that the circumstances upon which these cases were decided were entirely different from the case at bar, and the same is true with respect to the experience of others passing over a crossing in one of the cases cited.

This situation, compared to the situation we are concerned with in this case, is entirely inapplicable for the reason that we are dealing here with a condition in the highway which *every driver* would be reasonably certain to conform to a natural impulse, in order to avoid colliding with the north rail of the bridge and would find it necessary to make a correction, because of the contour of the highway, and we contend that it would be immaterial what type of automobile was involved or the speed it was moving, because the situation would be the same in every case.

With relation to Subdivision C on page 18 of the brief, we particularly say to the court that, when it is claimed that the witness Pat West was in a position to see and know what occurred (observation of 72/100 of a second) that an inspection of his testimony compared with that of Mabel Keough will disclose that this is highly questionable and it points almost certainly to the contrary.

Both these witnesses, Mabel Keough and Pat West, are defense witnesses and the irreconcilable testimony of the two is such that it certainly calls for the support of other witnesses for Appellee in this case to support the court's decision.

The testimony of Pat West was entirely unsupported by any other witness at all.

Further, when the question of the position from which the defendant entered upon the bridge is involved, we all start with the same evidence.

There isn't any conflict that he entered upon the bridge on his own side, but when we consider that this terrific impact occurred in the (approximately) east 38 or 40 feet of the bridge and he was driving the Pontiac automobile, of a length as is shown by the evidence, the direction of his approach into the bridge could well be in a straight line starting from the north side, and at the same time going directly across the unmarked center of the bridge into collision with Mary O'Keefe's automobile, and, we contend, that this is exactly what happened.

With respect to the situation contended for on page 20 of Appellee's Brief, we are fully in accord with the statement which counsel make that this court is not going to try a case de novo or substitute its judgment on facts for the judgment of the District Judge who tried the case below unless it appears that the appellee is bound by his testimony which is contrary to the Court's decision or unless the evidence, as a whole, is such that it demonstrates the Court's decision is clearly erroneous. That is the universal rule in the cases cited on page 20 and 21 of his Brief, and we are not in conflict with this rule in any particular.

With respect to a right-of-way for the Buick as argued on page 21 of the Brief, we certainly do not claim that the Buick had a right-of-way on the bridge, but we say that reasonable care, if a motorist traveling west and approaching the bridge observes an automobile coming on the bridge from the west, throws a duty upon such westerly proceeding driver to exercise ordinary care as he enters upon and proceeds across the bridge.

### THERE IS NO COMPETENT CREDIBLE EVIDENCE TO SUPPORT COURT'S FINDING

Passing to Subdivision C of Appellee's Brief, we appreciate that we have shown and must show in this case that the court's findings are contrary to the physical facts and the only evidence in the case, that will be persuasive to this court, will be evidence that is not contrary to the physical facts that have been demonstrated here.

### APPELLEE BOUND BY HIS OWN TESTIMONY

We appreciate that we have an area involved which is approximately 96 by 19½ feet and that it would be impossible for any motorist, who was exercising care and looking ahead, not to see what was in plain sight and for that reason the testimony of the defendant is absolutely binding upon him because it is ridiculous for appellee to claim that because he was watching the north rail that he could not see the rest of the area of the bridge, because, if he was looking ahead at all, every portion of that bridge in the highway was visible to him and he is bound by the testimony which he gave *that the Buick automobile was not traveling in a negligent manner and was not traveling out of its own lane of traffic.* (Tr. p. 291.)

A note in 80 A. L. R. at page 624 dealing with the conclusiveness of testimony of a party that is favorable to the adverse party, we submit to the court, forecloses the defendant from claiming that the Buick automobile was traveling in the north lane and swerved at an angle across his bow or across the front of his Pontiac automobile, because all of the substantial evidence, photographs and markings on the bridge and debris on the bridge contend to the contrary, but the rule that this testimony of Mr. Schoepski is binding upon him is supported by the cases that are mentioned in the anotation of 80 A. L. R. at page 624 with cases quoted and cited from most of the states of the United States. The rule is foreclosed as far as the State of Montana is concerned as is shown by the following cases:

Casey vs. Northern Pacific Ry. Co., 60 Montana 56, 198 P. 141;

Wilson vs. Blair, 65 Montana 155, 211 P. 289, 27 A. L. R. 1235;

Putnam vs. Putnam, 86 Montana 135, 282 P. 855;

Cullen vs. Peschel, 115 Montana 187, 142 P. (2d) 559.

Note: 169 A. L. R. 798.

WHEN THE DISTRICT COURT FOUND IN  
FAVOR OF THE DEFENDANT CONTRARY  
TO THIS BINDING EVIDENCE, IT WAS  
CLEARLY ERRONEOUS

The gouge mark which was caused by the terrific impact between the two cars was explained in the testimony of the highway patrolman, Officer Hardesty, and it was evident from the place that it was, on the floor of the bridge, and its distance from the sleeper on the south side

of the bridge that the gouge mark was made by a crushed part of the Buick; the debris nowhere else to the west beyond the Pontiac except in the area immediately to the west *on the south side*; the gouge mark demonstrating where the force of the two vehicles came together and caused this part of the Buick to gouge out the floor of the bridge at the point of impact; the light rubbing along the south rail of the bridge by the Buick as it was, demonstrates that the driver of the Buick automobile, Mary O'Keefe, was trying to avoid the oncoming Pontiac as it was passing over the center line of the bridge; the force of the Pontiac crushing the Buick up against the south bridge timbers up over the sleeper, flattening the tires on the Buick on the right side; the absence of any braking mark or any skid marks that would indicate that these vehicles were being manually controlled to place them in a position different to what the normal position would be in this confined area of 19 feet by not to exceed 35 or 36 feet; all these physical facts demonstrate almost to the point of demonstrable evidence that the collision between these two vehicles took place on the south side of the bridge and the testimony of Raymond O'Keefe is substantiated practically throughout.

Studying the evidence of the other witnesses that came upon the scene almost immediately, the testimony of Mabel Keough, supported in many of the material and important facts by the testimony of other witnesses that came upon the scene; the contention that the witness Pat West makes, in his evidence, that he was following the Pontiac and that he was immediately behind it, is completely discredited by the testimony of the driver of the laundry panel, Mabel Keough, and it is difficult for us to see how this testi-

mony that was completely conflicting could be said to be evidence which would support the court's finding in this case; and the physical facts, demonstrating to the point of certainty, that the testimony of this one hundred per cent witness, Pat West, was either deliberately colored or false and that this court in studying this case should carefully look to the record of the testimony of Mabel Keough and Pat West and see that, in many particulars, if the testimony of one was true, the other must necessarily be untrue and false, coupled with the fact that Mabel Keough was supported by the other arrivals at the scene which cannot be said of the witness, Pat West, and we respectfully submit that this is no foundation at all for the court's erroneous finding when we do not ask the court to analyze or try the case *de novo*, but simply to see that the evidence demonstrated at the scene makes the testimony of Pat West unbelievable in many particulars and contrary to established physical facts.

We urge that, when the young lady driving the laundry wagon, Mabel Keough, testified that the car belonging to Pat West was coming up behind her to the east as she reached the brow of the hill, she looked down and saw the accident happen; that he pulled up beside her attempting to pass, dropped back, and then, after she had briefly stopped at the brow of the hill and continued down to the point of the accident, that Pat West in his green station wagon pulled up on the south side of the highway beside her panel truck and stopped, makes us contend respectfully to this court, that the observation of the witness Pat West was such that it could not be the basis of calling him an eyewitness to the accident, although we do not dispute that he arrived shortly after the accident happened.

The quantity of his testimony is one hundred per cent, the quality of the testimony is practically less than zero.

When we know from the circumstances that the entire action took place in about seven tenths of a second, it was certainly marvelous that there was and is a human being who could detail all of the minute details about this collision with the exactness that we demonstrated by the witness Pat West in his testimony in this case, when mathematical calculation discloses that, at best, his observation was confined to the period of 72/100ths of a second; the physical facts are contrary to his testimony, and the testimony of Walter Schoepski disputes him as to the lane the Buick was traveling in on the bridge, we urge that the court's decision was clearly erroneous in this case.

Certainly Pat West could not see through the knoll 500 feet to the east from the bridge; he was not directly behind the Pontiac, as he claimed, *but was following the laundry panel* up the knoll from the east—most certainly reaching the first point of observation of the bridge, after the collision was observed by the witness Mabel Keough. He did not stop on the north side of the road east of the bridge at all, but on the south side thereof. (See testimony of other witnesses arriving at the scene immediately after the accident happened.) He could not have been an eye-witness to the actual collision.

Passing for the moment the hundred per cent quantity of the testimony of the witness Pat West in this case and the discrepancies which appear in his testimony to which he will allude later. What opportunity did Pat West have to see and relate that about which he testified? At 45 miles per hour, an automobile will travel approximately 67 feet in a second. The entire happening of this regrettable

casualty took place in a period not to exceed one second from the time the cars entered the bridge until the collision was over and the cars had arrived at their respective positions after the collision. What he observed in a second while driving his automobile to the first point of possible observation is phenomenal, particularly the accuracy with which he presumes to describe the happening of the accident.

Later we will see that he did not have an opportunity to see the actual happening of the accident at all, unless it was immediately after it happened.

On his direct examination, he testified as follows:

“Q. Now, going back to the place where you came into the bridge when the accident happened, the Pontiac, where was it with reference to the lane of travel you were in?

A. The Pontiac was on the right side of the road.

Q. Did it continue that way?

A. Yes, all while I followed it up until the time it entered the bridge.

Q. On its own right hand side of the road?

A. Yes.”

(Tr. p. 187.)

In his cross examination, the witness West was asked whether or not the front end of the Pontiac was across the lane to the south—showing him a photograph:

“Q. Well, of course, this is a photograph. I want your memory of it, you was on the ground.

A. *There was no line there. I couldn't actually say that the front end of the car was over the line, over the center.*”

(Tr. p. 208.)

At this point, we want to comment that he had at the time been around the Pontiac for a period of 20 to 25 minutes, as we estimate and because there was no center line on the bridge, he was unable to say from his memory that the front end of the Pontiac was over the center line to the south.

Now, compare this situation with his testimony concerning his observation of a second at the most and he purports to place with detail the point of the collision on the north side of the surface of the bridge.

This demonstrates that Pat West was testifying from his reasoning and observation, such as it was, rather than what he actually saw. The Court will recall that on direct examination of Pat West at page 187, he testified that the Pontiac was on its own right hand side of the road and that he followed it up until the time it entered the bridge, but compare this to the supported testimony of Mabel Keough.

It is important to remember here that there is no conflict in the testimony that the Pontiac was on its own right hand side up to the time it entered the bridge because the witness O'Keefe also testifies that it was.

On cross examination, however, we attempted to inquire from the witness where the collision occurred, and it is important to study this part of his testimony. We had him illustrate by the use of two toy autos and as it is backed up by the record, at pages 205-206, he illustrated the two cars coming down each on their own side and the following occurred:

"A. Well, as they came—this is the bridge (indicating)?"

Q. Yes, this is the bridge.

Q. The Pontiac came in on its side of the road, the right hand side, the north side of the road. As the Buick came in on to the road, the collision was hit here, and the Buick was thrown this way—

Q. Well, let's have the cars come together, please, as near as you can, how did they come together?

A. *They must have locked right in here, or in this position because this car was on the right hand side of the road.* The accident couldn't have happened that way. I was watching the back of this car. That was the one I was afraid of running into, that was why I was braking down.

Q. I thought you was braking down so the Buick wouldn't run into you?

A. Well, I had to stay out of the way of this Pontiac to start with. That was before the accident.

Q. All right, then, the collision occurred on the bridge. What is your best judgment of approximately where?

A. Well, I would say the distances on this to the bridge, it was right about in here. Of course, the cars you have got here are a little long—

COURT: Indicating the last third of the bridge?

A. Indicating the last third of the bridge, yes.

Q. And, then, the way you have it illustrated there, they were both on their own side at the time of the collision?

A. No, I say that the Pontiac went on to the bridge on the right hand side of the road.—

Q. Yes.

A. And the collision occurred. *Now, this car, I wasn't watching where it was going, whether it was over on the wrong side. It must have been to hit the Pontiac, because the Pontiac was on the right hand side of the road.*

Q. Let me get this straight, what you are saying, that you didn't see the impact, you just saw the car ahead of you?

A. No, I saw the impact, your Honor, yes, *but to put the wheels of this car across that road, I*

*couldn't say that because I wasn't watching the line, but I saw the impact, I saw the Buick hit the bridge railing, and that is when it come right around in front of my car.*

Q. Well, now, let's get that part of your recollection straight. You say you think that the cars then hit in such a position that the Buick careened over after the collision—

A. After the collision, the Buick hit the bridge railing.

Q. Then, the collision occurred farther down the bridge so that the Buick careened after the accident, is that it?

A. Yes, it hit the bridge after it hit the Pontiac.

Q. After it hit the Pontiac. And then the Pontiac, was the Pontiac driven back towards you?

A. The Pontiac was just lodged in there that way. It twisted in between the Buick and the rail and when it hit, and when it hit, it just swooped it around, it spun in the road.

Q. And the Pontiac was spun after it was struck by the Buick and went in against the guard rail, is that right?

A. Yes.

Q. And the Buick careened off and hit the side of the bridge, is that correct?

A. Yes."

(Tr. pp. 205-206-207.)

It is important too, in studying his testimony about this important matter, to notice his answer on page 205 where he says: *they must have locked right in here, or in this position because this car was on the right hand side of the road. The accident couldn't have happened that way. I was watching the back of his car. That was the one I was afraid of running into, that was why I was braking down.*

This is evidence that demonstrates that the witness West is testifying from his judgment and not from what he saw. The same thing appears on page 206. It was apparent to the Court that he did not actually see the relative positions of the cars in the accident.

Now, this type of testimony on the very important point as compared in strength to the testimony of the highway patrolman Hardesty, from the evidences upon the ground, is like a comparison of a pigmy to a giant.

Commenting on the testimony of the witness Mabel Keough recorded on page 30 of Appellee's Brief, it is conclusive that this witness did not fix the relative position of the two cars at the point of impact with reference to the unmarked center line of the bridge.

That the Buick swayed when it hit the south bridge railing is certain.

That, after hitting the south rail of the bridge, it came across to the north side of the highway into the barrow pit is certain.

When we consider that the movement of the Pontiac into the south lane, as the physical evidence demonstrates, must have been instantaneous, the physical facts showing the point of the collision to have been in the south lane are the only reliable evidence of the place where the impact occurred.

The eye-witnesses were not in a position to detail these circumstances with exactitude.

## REVIEW OF THE PHYSICAL FACTS SHOWN

1. The Buick never left its lane of travel until after the collision when it went driverless off the east end of the bridge circling in to the barrow pit. This is demonstrated by paint scrapings on the south rail of the bridge which started at the fifth bridge post from the west—a 2 foot 10 inch paint scrape; next, 14 feet 1 inch further east a 6 inch paint scrape, and then the gouging and paint scraping easterly from the approximate point of the collision—two posts further east and then in the area testified to by Patrolman Hardesty where the bumper gouge and the scrapings on the bridge indicated that the Pontiac had crushed the Buick car on its left side and forced it into the bridge rail along the area testified to.

2. The collision was confined between the north and south bridge railings. The gouge mark on the floor of the bridge indicating the place where a portion of the Buick was crushed down into the surface of the bridge in the collision.

3. There is an entire absence of any post-collision debris on the north half of the bridge to the west of the Pontiac and place of collision. The post-collision debris being all in the south lane of the bridge except under and beside the Pontiac as it ended up on the bridge after the collision.

4. The position of the gouge mark on the north rail of the bridge near the fifth bridge post from the east, plaintiffs' Photograph 3 of Exhibit 4 shows the gouge mark with relation to the Pontiac after the collision and shows where the rear bumper of the Pontiac rubbed the top rail

in the collision as it was pushed backward and spun around as the cars crushed together as the Buick went through to the east. This was the only marking along the north side of the bridge. See also Photograph 11 of Plaintiffs' Exhibit 4.

5. Both cars left their markings on the bridge and their debris on the bridge demonstrating the area of the collision which was confined to an area of  $19\frac{1}{2}$  feet wide by not to exceed 40 feet in length from the east end of the bridge and showing the collision occurred in the south lane.

6. The parts of the automobiles which were picked up and laid at the east end of the bridge shown in Photograph No. 2 of Plaintiffs' Exhibit 4 were taken out of the south lane along with the fender shown in Photograph No. 3 of Plaintiffs' Exhibit 4 to clear the path for the ambulance (See testimony of Vern Kapphan Tr. 118 through 128, with particular reference to page 121).

7. The Pontiac was skidded over just enough to permit the ambulance to go through and the Pontiac was skidded over to the north to clear the south lane for the ambulance.

8. The crushed position of the two cars indicate that they came together practically head-on and not a sliding blow across the bow of the Pontiac, and if the Buick was cutting across as is suggested by Apellee's argument, the Buick would have crashed through the bridge on the south railing instead of leaving its markings along the south rail of the bridge from the fifth post from the west through to the fourth post from the east. The Buick did not cut

from the north lane to the south. The physical evidence demonstrates conclusively to the contrary.

See:

McAlexander vs. Lewis, 93 N W (2d) 632.

#### REPLY TO SUBVISION 4 OF APPELLEE'S BRIEF

With respect to point 4 of Apellee's Brief, we are familiar with the record that the judgment in one of the cases, being the case where the damages were assessed against the Administrator of the estate of Mary A. O'Keefe, deceased in his capacity as administrator, which, of course, is case number 1799 of the three cases involved was satisfied.

The situation actually in this case was that with the large judgment against the estate of Mary A. O'Keefe, deceased, the liability insurance company stepped in and made a compromise settlement by payment of an amount less than the judgment that was awarded, and we feel that the liability insurance company with their insurance policy being the only asset in the estate of Mary O'Keefe, deceased, was under a considerable pressure with this judgment hanging over them; that the settlement was really compulsory.

The question of whether or not that makes the appeal in 1799 moot is respectfully presented for the consideration of the court under the authority of 5 C. J. S. Section 1354 page 425 and the cases cited under Note 96.

We call attention to the Court, never-the-less, the fact that Stephen Granat, as administrator in the two cases—1798 and 1799—was acting in entirely different capacities, and there could not be, under any circumstances in these

cases, a judgment against Stephen Granat as administrator in his capacity as Trustee for the heirs of Mary A. O'Keefe, deceased, and consequently if the Court will find the question moot under the circumstances involved, it could only be moot as to the case where Stephen Granat was representative of the estate of Mary A. O'Keefe, deceased, and certainly not in his capacity as Trustee for the heirs because the findings clearly would be finding against Mary O'Keefe because of her negligent driving and therefore, we contend that under well established principles, if this appeal is moot as to this one case, it could be moot as to only the one case and not as to the other two.

But we do say that in accordance with the general rule mentioned in Section 1354, Subdivision 6, 5 C. J. S. page 425 that there was a terrible pressure on the liability insurance company with this extremely heavy judgment entered against their insured to make an adjustment of the case, if possible, and dispose of the liability which they would have as liability insurance representative of the estate of Mary A. O'Keefe deceased.

The joinder of the plaintiffs in the three cases before the court at this time were joined as a procedural matter and it did not effect the substantive rights of the parties.

See:

Landsburg and Brothers v. Clark, 127 Federal (2d) page 331.

The principle of law for which we contend is illustrated in the following case from the Supreme Court of North Carolina and which shows that a plaintiff in the same position as Stephen Granat as in these cases is not estopped

from proceeding in a different capacity in connection with the same automobile accident, and we think it illustrates the point which we are asking the court to consider at the present time.

Joe Ellis Raybill v. Rosa Ferris, 213 N. C. 414, 196 S E 321.

See note: 116 A. L. R. page 1087.

We invite the Court to an examination of a very good anotation on the subject which appears in 170 A. L. R. commencing at page 1180.

See also Subdivision B. in Note on page 1202 as between different fiduciary capacities.

We also call the court's attention in support of our position, in this matter to the text of Barron and Holtzoff Federal Practice and Procedure on page 105 under Rule 20, Section 532 where the following appears:

"Although plaintiffs may be joined in one action their claims remain as separate and distinct as if asserted in separate actions. The rule itself provides that judgment may be given for one or more of the plaintiffs according to their respective rights to relief. Thus where a wife, suing for damages for personal injuries, was joined with her husband suing for expense and loss of services a judgment against the wife did not preclude a verdict in favor of the husband, as the bringing of a joint action did not affect the substantive rights of the parties."

2 Federal Practice and Procedure, Section 532, page 105.

"Consolidation of two causes does not have effect of making the parties to one suit parties in the other, but the causes preserve their separate identity. The pleadings in one case cannot be made the pleadings in the other. Purpose of consolidation is to allow the

proofs in one cause to stand as proofs in the other with reference to common questions of fact."

National Nut Co. of Cal. v Susu Nut Co., D. C. Ill. 1945, 61 F. Supp. 86.

As to causes 1798-1799.

1. There is no identity of the thing sued for.
2. There is no identity of the cause of action.
3. There is no identity of the persons and parties to the action.
4. There is no identity of the quality of the person for or against whom the claim is made.

50 C. J. S. Judgments, Section 598, page 16.

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We respectfully asked the Court to examine the points which we have presented and we urge that this case should be reversed.

Respectfully submitted,

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